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AUTHORITIES CITED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-506

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

v.

MIDWEST VIDEO CORPORATION, *Respondent.*

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

This case involves the narrow question of whether the Federal Communications Commission ("the Commission") has the authority under the Communications Act of 1934 to compel community antenna television ("CATV") systems with 3500 or more subscribers to engage in the business of originating programs. The United States Court of Appeals for the Eighth Circuit ruled in the Opinion below (Pet. App. A) that the Commission did not have such authority.

In order to place this question in perspective, it is necessary briefly to review the history of the development of CATV regulation by the Commission.

CATV had its inception in the late 1940's when systems commenced operation as a means of providing television signals to communities where normal television reception was poor or non-existent. At the outset, these systems were for the most part of limited capacity, providing service from generally no more than three television stations whose signals were captured directly off the air at a relatively high location and distributed by cable to subscribers. In these early stages of CATV development, the Commission at first largely ignored such operations and then, upon conducting an investigation of the matter, concluded that CATV was not an appropriate subject for Commission regulation.[1] As time progressed, the industry continued to grow and expand both in number of subscribers and number of television channels delivered to subscribers. In addition, CATV systems also began to distribute to their subscribers television signals originating from stations distant from the CATV community. Often these distant signals were delivered to the CATV system by means of microwave relay.[2] In view of these developments, commencing in 1962, the Commission, on a case-by-case basis, began to reassess its role with respect to the CATV industry and to exercise jurisdiction over it

[1] *See Inquiry into the Impact of Community Antenna Systems, TV Translators, TV "Satellite" Stations, and TV "Repeaters" and the Orderly Development of Television Broadcasting,* 26 FCC 403.

[2] Microwave relay involves receiving television signals at a favorable receiving location and transmitting them by means of high frequency radio waves to locations where the signal of the originating station could not otherwise be received.

in acting on applications for microwave authorizations.[3] Later, by rule making, the Commission asserted jurisdiction over all CATV operations where the television signals were received by means of microwave.[4] Ultimately, finding that the unregulated growth of CATV systems, whether receiving signals off-the-air or by microwave, could have an adverse effect upon the development of free, over-the-air broadcasting, and in particular upon the growth and development of UHF broadcasting, the Commission assumed jurisdiction over all CATV operations by adopting rules and regulations designed to minimize the impact of CATV development on the growth, and continued vitality of the television industry.[5]

The regulations adopted by the Commission during this period related entirely to those functions of CATV systems which involved reception of signals transmitted by broadcast stations and their simultaneous transmission by cable to subscribers. Thus, the rules dealt with the signals which a CATV system was eligible to carry, those which it was required to carry, program exclusivity requirements which CATV systems were required to afford various classes of television stations, and the procedures for implementing these provisions. The validity of these rules and regulations was sustained by this Court in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). In that decision, however, this Court emphasized that the only authority which it recognized the Commission to have over CATV

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[3] *See Carter Mountain Transmission Corp.*, 32 FCC 459 (1962), *aff'd sub nom. Carter Mountain Transmission Corp.* v. *FCC*, 321 F. 2d (D.C. Cir. 1963), *cert. denied*, 375 U.S. 951 (1963).

[4] *First Report and Order*, 38 FCC 683 (1965).

[5] *Second Report and Order*, 2 FCC 2d 725 (1966).

was that "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" and that it was expressing no view "as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes." *Id.* at 178.

The rules and regulations relating to CATV systems considered by this Court in *Southwestern Cable* were silent with respect to either the right or obligation of CATV systems to originate programs of their own. On December 12, 1968, the Commission adopted its *Notice of Proposed Rule Making and Notice of Inquiry in Docket No. 18397,* 15 FCC 2d 417, instituting the proceeding which resulted in the promulgation by the Commission of the requirement that all CATV systems with 3500 subscribers or more originate their own programming in a manner similar to the way television stations originate programming. It is the validity of this requirement which is at issue in this case.[6]

ARGUMENT

The court below was clearly correct in its ruling that the Commission is without authority to compel operators of CATV systems to "engage in the entirely new and different business of originating programs" as a condition of remaining in the business of capturing television signals off-the-air and transmitting them by cable to subscribers. (Pet. App. A, pp. 23-24). No contention is made that this decision conflicts with the

[6] The Commission in the same proceeding also adopted rules and regulations similar to those applicable to television broadcast stations regulating the program operations of CATV systems. The Court below did not pass upon the validity of these regulations.

decisions of any other Court of Appeals. Moreover, the ruling of the court below does not raise any substantial questions of general importance concerning the authority of the Commission to regulate other aspects of CATV operations. The consideration, therefore, of the broader question of the Commission's authority to adopt a comprehensive regulatory scheme for CATV which is invited by Petitioners would be premature at this time. Accordingly, review by this Court is not warranted.

The court below held that regardless of whether the Commission's authority in the CATV area was limited to regulation "reasonably ancillary" to the effective regulation of broadcasting as this Court ruled in *Southwestern* or whether its authority was much broader, as the Commission argued, the Commission was without authority to condition continuation in the business of receiving and distributing programs by CATV systems on the willingness of such systems to enter into the business of originating programs.[7] (Pet. App. A, pp. 23-25). The court below recognized the fundamental distinction which exists between the business of receiving and retransmitting programs originated by television broadcast stations and the business of producing and distributing original programs. (Pet. App. A., pp. 20-21). This distinction has been plainly spelled out by this Court in *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390, 400-401 (1968)

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[7] The views expressed in the Petition on the merits of this case are expressly represented as being those of the Commission, not the United States. (Pet., pp. 1 and 13). Therefore, positions and arguments contained in the Petition which are discussed herein will be attributed to the Commission.

and was elaborated upon by the court below as follows (Pet. App. A, p. 24):

> Entering into the program origination field involves very substantial expenditures. Costly equipment must be purchased. Personnel must be employed who are skilled in photography, sound production, program planning and direction and performing. Such expenses will often prove burdensome because of the limited area the program will reach. See Federal Regulation of Cable Television: The Visible Hand, Chazen and Ross, 83 Harvard L. Rev. 1920.

Finding that traditional CATV operations and cablecasting operations are different businesses, the court correctly concluded that the Commission was without authority to condition the right of persons engaged in CATV operations to continue in such business upon their becoming program originators. *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583 (1926). The imposition of such a condition would amount to confiscation of property.

The Commission's contention that there is no evidence in the record that cablecasting would be economically burdensome in individual cases (Pet. p. 11, note 10) misses the point. The issue in this proceeding, as recognized by the court below, was not whether individual CATV systems could survive economically if required to cablecast, but whether the Commission had the authority to require CATV systems, against their will, to enter into this business. In its *First Report and Order* the Commission cites data indicating that the costs involved in converting a CATV reception-distribution system to a cablecasting system would range from $27,300 for a basic black and white system to $95,000 for a full color system and that annual op-

erating costs would range from $14,400 for a black and white system to $33,000 for color operations. (Pet. App. C, p. 40). A review of the various factors involved in these cost estimates leaves no doubt that cablecasting is not merely an adjunct of CATV operations, but is, as the court below observed, an entirely different business activity requiring different equipment, materials and personnel.[8]

General Telephone Co. of California v. *FCC*, 413 F. 2d 390 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 888 (1970) is not authority, as the Commission apparently suggests, for the proposition that its regulatory authority over CATV operations is plenary. The issue before the court in *General Telephone* was whether the Commission's assertion of authority to regulate the conditions under which telephone companies undertook to distribute television signals to CATV systems under Section 214(a) of the Communications Act (47 U.S.C. § 214(a)) was sustainable. The telephone companies argued that their activities in distributing television signals to CATV systems were wholly intrastate, and therefore, beyond the pale of Section 214(a). The court held that the fact that the activities of telephone companies were confined within the boundaries of the State of California did not remove such activities from the common carrier jurisdiction of the Commission noting (*Id.* at 401):

> The Petitioners have, by choice, inserted themselves as links in this indivisible stream [from

[8] The fact that cablecasting and CATV both require the same type cables for distributing their product to subscribers does not make cablecasting any more an integral part of the business of operating a CATV system than does the fact that cablecasting and television broadcasting both require the same type of program origination equipment and personnel make cablecasting an integral part of the business of broadcasting.

> television station to viewer] and have become an integral part of interstate broadcast transmission. They cannot have the economic benefits of such carriage as they perform and be free of the necessarily pervasive jurisdiction of the Commission.

It is clear from the context of the case that the court did not intend to suggest in the language just quoted that anyone deriving economic benefits from broadcast signals is subject to the Commission's "pervasive jurisdiction." The "pervasive jurisdiction" of the Commission referred to in *General Telephone* was its common carrier jurisdiction. The telephone companies challenging the Commission's authority were admittedly common carriers, but they sought to escape the Commission's jurisdiction on the grounds that distributing television signals to CATV systems was "intra" rather than "inter" state. The court found that the carriage was interstate and held, therefore, that the petitioners were subject to the Commission's common carrier jurisdiction.[9] What the Court held was that since interstate commerce was involved, the exemption for intrastate operation of common carrier was not available. The effect of the ruling was that the specific provisions of Sec. 214(a) of the Communications Act were applicable to the carrier and that it could not construct certain facilities without Commission consent. However, the ruling of *General Telephone* could hardly be construed as a recognition of authority on the part of the Commission to compel the common carrier to

[9] The court specifically recognized, however, that a CATV system carrying interstate signals for its own use, is not a common carrier and, therefore, would not be subject to this "pervasive jurisdiction" which resulted from the Commission's express authority to regulate communications common carriage. *Id.* at 393-94, note 3.

operate a television station, originate programs over cables, publish a newspaper or undertake similar activities which the Commission might deem to be in the public interest. By the same token the mere fact that CATV operations constitute interstate communication by wire cannot be construed as conferring upon the Commission the power to compel CATV companies to become broadcasters. The Communications Act confers no such authority on the Commission with respect to broadcast applicants—they are free to apply for the privilege to broadcast; they cannot be compelled to do so. There is no reason why such a power should be held to exist in the case of CATV companies. The Commission is attempting to stretch its authority in a manner tantamount to a government ukase to a company like General Motors that its right to continue in the business of manufacturing cars and trucks would be terminated unless it agreed to enter the business of manufacturing helicopters.

II.

Despite the Commission's protestations to the contrary, it is clear that the Petition raises no broad issues of general significance requiring resolution now by this Court. The Commission contends that the ruling of the court below restricts its jurisdiction to regulate CATV as part of its overall scheme "to establish a unified system of regulation of the 'radio and wire' communications industry" and the Commission holds up before this Court the specter of "disparate state and local regulation of CATV services" and a return to the chaos in the communications field which existed prior to the enactment of the Communications Act. (Pet., pp. 11-13). The narrow ruling of the court below is clearly incapable of having the disastrous effects upon the

Commission's "unified system of regulation of the 'radio and wire' communications industry" which the Commission claims.

First, it has already been pointed out there is nothing in the court's ruling which in any way passes upon the Commission's authority to regulate program operation by CATV systems voluntarily engaging in program origination. The court's decision thus has no bearing on possibilities of "chaos" resulting from unregulated program operation by CATV systems.

Secondly, it is apparent from the Petition that the Commission's concern is really not mandatory origination as such but rather its fear as to the validity of a series of Commission proposals not yet adopted, which envisage the integration of CATV into a comprehensive program to regulate the nation's communications media. (Pet., p. 13). The validity of these proposals was not considered, let alone passed upon, by the court below. Therefore, it is clear that consideration by this Court of the Commission's authority to adopt the comprehensive regulatory scheme which it is contemplating would be premature. Mandatory program origination constitutes only one element of that proposed regulatory scheme, and a limited one at that, as a review of the Commission's letter to the Chairmen of the Senate Communications Subcommittee and the House Communications and Power Subcommittee, *In re Commission Proposals For Regulation of Cable Television,* 31 FCC 2d 115 (1971), makes clear. The thrust of that regulatory scheme as disclosed thus far, is to require increased channel capacity and the dedication of channels for various public uses. Under the Commission's proposals, the responsibility for programming these channels would be placed on various elements of

the public, and not on the CATV operator. CATV operators have been in the business of providing communications channels to their subscribers, and regulation of the number of channels that must be made available and the means for making them available may involve considerations different from those raised by a requirement that the CATV operator himself go into the entirely new business of originating programming. Thus, a determination of the Commission's power to adopt the comprehensive scheme to integrate communications media can only be made after its regulations have been formulated and the Commission has made a factual determination on the relationship of the regulations to its statutory authority.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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